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A

AmWang Credit Sdn Bhd v Goh Che Chern

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(W)-2027–08 OF 2012

ZAHARAH IBRAHIM, ANANTHAM KASINATHER AND MAH WENG KWAI JJCA

20 MARCH 2014

C

Moneylenders — Loan — Action to recover monies due under loans — Whether moneylender breached ss 16, 17A, 18, 23 and 27 of the Moneylenders Act 1951 — Whether O 79 r 3 of the Rules of the High Court 1980 not complied with

D

In the instant appeal, the appellant, a licensed moneylender, sought to overturn the decision of the High Court dismissing its claim against the respondent for monies unpaid under three loans. The High Court found the appellant had breached several provisions of the Moneylenders Act 1951 ('the Act') and had also not complied with O 79 r 3 of the Rules of the High Court 1980 ('RHC').

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The court allowed the respondent's counterclaim for a declaration that the three loans were void ab initio and granted orders that the appellant provide a true and accurate account and that it refund to the respondent any amount it had received in excess of its lawful claim.

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Held, allowing the appeal and ordering the case to be remitted back to the High Court:

(1) The High Court's finding that the appellant's claim was flawed for non-compliance with O 79 r 3 of the RHC was erroneous. Based purely on the evidence of PW1, the High Court found that the figures of how much was lent and received were erroneous. The issue of how much was actually paid and how much was still unpaid was not an issue of compliance or otherwise with O 79 r 3. In the instant case, the plaintiff had disclosed that the transactions were moneylending transactions and the statement of claim did provide the statement of accounts which were required to be furnished under O 79 (see paras 16–17 & 21–23).

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(2) With regard to s 16 of the Act, the High Court did not give due consideration to the words set out in the second portion of the memorandum/promissory notes containing the acknowledgement of receipt of the loan and acknowledgement of receipt of a copy of the promissory note, which copy, at the time of receipt, was authenticated by the appellant but not yet signed by the respondent (see paras 28–29).

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(3) The High Court found that the appellant did not comply with s 18 of the Act but that issue was never raised in the respondent's statement of

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defence; nor was there anything in the evidence of the witnesses called by both parties that touched on non-compliance with s 18 (see paras 30–32).

(4) The High Court did not give sufficient consideration to the reasons given by PW1 for his admission that the respondent was paid a sum less than the actual loan amount. The difference between additional charges in respect of the loan (which were prohibited by s 23 of the Act) and the payment of part of the loan amount to a third party were not considered (see para 40).

(5) The High Court failed to consider the difference between s 22 (now repealed) of the Act and s 17A in the treatment of interest rates in excess of the prescribed rates. Such consideration was critical in view of the fact that s 22 governed the first two loan transactions and not s 17A. The dismissal of the appellant's claim was the result of s 22 not having been given any consideration at all (see para 44).

[Bahasa Malaysia summary

Dalam rayuan ini, perayu, pemberi pinjam wang berlesen, memohon untuk mengubah keputusan Mahkamah Tinggi yang menolak tuntutannya terhadap responden untuk wang yang dibayar di bawah tiga pinjaman. Mahkamah Tinggi mendapati perayu telah memungkiri beberapa peruntukan Akta Pemberi Pinjam Wang 1951 ('Akta') dan juga tidak mematuhi dengan A 79 k 3 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Mahkamah membenarkan tuntutan balas responden untuk perisytiharan bahawa ketiga-tiga pinjaman adalah void ab initio dan membenarkan perintah-perintah bahawa perayu memberikan akaun betul dan tepat dan ia membayar balik kepada responden apa-apa jumlah berlebihan yang diterimanya terhadap tuntutan sahnya.

Diputuskan, membenarkan rayuan dan memerintahkan kes diremit ke Mahkamah Tinggi:

(1) Dapatan Mahkamah Tinggi bahawa tuntutan perayu adalah cacat kerana tidak mematuhi A 79 k 3 KMT adalah salah. Berdasarkan semata-mata keterangan PW1, Mahkamah Tinggi mendapati bahawa angka-angka berapa banyak dipinjamkan dan diterima adalah salah. Isu berapa banyak sebenarnya dibayar dan berapa banyak lagi yang masih tidak dibayar bukan isu kepatuhan atau sebaliknya dengan A 79 k 3. Dalam kes ini, plaintif telah mengemukakan bahawa transaksi adalah transaksi pinjaman wang dan pernyataan tuntutan tidak memberikan pernyataan akaun yang dikehendaki dikemukakan di bawah A 79 (lihat perenggan 16–17 & 21–23).

(2) Berkaitan s 16 Akta, Mahkamah Tinggi tidak memberikan pertimbangan sewajarnya kepada perkataan yang ditetapkan di dalam

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bahagian kedua memorandum/nota janji hutang yang mengandungi pengakuan penerimaan pinjaman dan pengakuan penerimaan salinan nota janji hutang, salinan mana, pada masa penerimaan, telah disahkan oleh perayu tetapi belum ditandatangani oleh responden (lihat perenggan 28 & 29).

(3) Mahkamah Tinggi mendapati bahawa perayu tidak mematuhi s 18 Akta tetapi isu tersebut tidak pernah dibangkitkan di dalam pernyataan pembelaan responden; juga tidak terdapat apa-apa dalam keterangan saksi-saksi dipanggil oleh kedua-dua pihak yang menyentuh mengenai ketidakpatuhan dengan s 18 (lihat perenggan 30–32).

(4) Mahkamah Tinggi tidak memberikan pertimbangan yang mencukupi kepada alasan-alasan yang diberikan oleh PW1 untuk pengakuannya bahawa responden dibayar jumlah yang kurang daripada jumlah pinjaman sebenarnya. Perbezaan antara caj-caj tambahan berkaitan pinjaman (yang mana dilarang oleh s 23 Akta) dan bayaran sebahagian jumlah pinjaman kepada pihak ketiga tidak dipertimbangkan (lihat perenggan 40).

(5) Mahkamah Tinggi gagal untuk mempertimbangkan perbezaan antara s 22 (telah dimansuhkan) Akta dan s 17A dalam pengolahan kadar faedah yang berlebihan daripada kadar yang ditetapkan. Pertimbangan sedemikian adalah kritikal mengambil kira fakta bahawa s 22 mengawal transaksi kedua-dua pinjaman pertama tersebut dan bukan s 17A. Penolakan tuntutan perayu adalah akibat daripada s 22 tidak diberikan apa-apa pertimbangan langsung (lihat perenggan 44).]

Cases referred to

Aseam Credit Sdn Bhd v Eminent Avenue Sdn Bhd [2003] 1 MLJ 90, HC (refd)
Chee Pak Choy & Ors v Scotch Leasing Sdn Bhd [2001] 4 MLJ 346, CA (distd)
Kartar Singh v Mahinder Singh [1959] 1 MLJ 248 (refd)

Legislation referred to

Moneylenders Act 1951 ss 16, 17A, 17A(3), 18, 21, 22, 23, 27, 27(3)
Rules of the High Court 1980 O 79, O 79 r 3

Appeal from: Civil Suit No 22NCC-158–02 of 2012 (High Court, Kuala Lumpur)

Harpal Singh (Reny Rao & Harjinder Singh with him) (AJ Ariffin, Yeo & Harpal) for the appellant.
HP Chua (Onn & Partners) for the respondent.

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Zaharah Ibrahim JCA (delivering judgment of the court):

BACKGROUND FACTS

[1] The appellant was the plaintiff in the High Court, and the respondent was the defendant. We shall refer to the parties as they were in the High Court.

[2] The plaintiff is a private limited company and was a licensed moneylender at the material time.

[3] The plaintiff claimed to have lent the defendant monies on three occasions:

28 June 2000:	RM470,000 (with interest at 12%pa)
18 July 2000:	RM270,000 (with interest at 12%pa)
15 June 2006:	RM200,000 (with interest at 18%pa)

[4] According to the plaintiff, on 25 July 2007, the defendant appealed to the plaintiff to accept the sum of RM1.6m to be paid by way of two cheques of RM800,000 each to be banked in by 30 June 2008 and 30 June 2009, respectively, as full and final settlement of the debt then owing by the defendant to the plaintiff. The plaintiff acceded to the defendant's appeal.

[5] The defendant then issued two personal cheques drawn on Hong Leong Bank Bhd, being Cheques No 691869 and 691870, for the sum of RM800,000 each, to be presented for payment on the agreed dates.

[6] However, on the agreed dates, the defendant requested the plaintiff not to present the cheques as he had insufficient funds to honour the cheques.

[7] On 25 January 2011 and 18 May 2011 a total sum of RM37,500 was paid by the defendant to the plaintiff, leaving a balance of RM1,562,500 remaining unpaid of the agreed settlement amount.

[8] Demands were made by the plaintiff through its solicitors on 23 August 2011 and 4 November 2011 respectively. When payment was not made by the defendant, the present suit was commenced.

[9] A careful perusal of the statement of defence shows that the defendant does not deny having been given the loans.

[10] The defendant however claims that:

(a) the plaintiff did not comply with the relevant laws, in particular ss 16,

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A 17A and 27 of the Moneylenders Act 1951 (Act 400); and

(b) the defendant had made repayments totalling RM1,699,000 during the period from the disbursement of the loans and January 2012, in excess of the principal sums and lawful interest due on the loan amounts.

B

[11] The defendant consequently counterclaimed for a declaration that the three loan agreements were void ab initio, for an order that the plaintiff provides a true and accurate account, and for an order that the plaintiff pays back to the defendant any amount in excess of the lawful claim of the plaintiff.

C

HIGH COURT DECISION

[12] The High Court found that the plaintiff had breached the provisions of Act 400 and O 79 r 3 of the Rules of the High Court 1980, and dismissed the
D plaintiff's claim but allowed the defendant's counterclaim.

THE APPEAL IN THE COURT OF APPEAL

[13] The plaintiff appealed to this court against the High Court's orders.

E

[14] In gist, the plaintiff's appeal before us is founded on its contention that the learned High Court judge erred in finding that the plaintiff had breached the various provisions of Act 400, and in particular that Her Ladyship has erred in treating the three loans on the same footing when the third loan was given
F after Act 400 was amended in 2003 and therefore subject to a different legislative regime vis a vis the earlier two loans.

ISSUES

G **[15]** The issues before us are therefore:

(a) whether the plaintiff had breached several provisions of Act 400; and

(b) whether the plaintiff had failed to comply with O 79 r 3 of the Rules of the High Court 1980.

H

Order 79 r 3 of the High Court Rules 1980

[16] The learned High Court judge found that even though on the face of the statement of claim it appears that the provisions of O 79 r 3 of the Rules of
I the High Court 1980 had been complied with, Her Ladyship found that the figures shown are erroneous as, according to Her Ladyship, PW1 in his witness statement had admitted that the sum of RM566,000 had been repaid towards the settlement of the first and second loans and the sum of RM1,117,500 had been received from the defendant.

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[17] The learned High Court judge's finding of non-compliance of O 79 r 3 of the Rules of the High Court 1980 is purely based on the evidence of PW1 of amounts said to have been repaid towards the loans and PW1's admission that of the amounts stated as the amounts lent under the first and second loans (RM470,000 and RM270,000 respectively) only the sums of RM399,500 and RM229,500 were actually paid directly to the defendant.

[18] We note that the learned High Court judge relied on the judgment of the Court of Appeal in *Chee Pak Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346, (the *Scotch Leasing*'s case) in particular as set out in para 5 of the headnote under 'Held' at p 348 which is as follows:

> There were also non-compliance with O 79 of the Rules of the High Court 1980. Since the respondent did not comply with O 79, it followed that its originating summons was fatally flawed.

[19] We have referred to the full judgment in that case and we find the factual matrix to be quite different from the present case. We reproduce the relevant part of the judgment at pp 362 and 363 of the report:

> I begin with the cause papers filed with the High Court by the respondent in its application for an order for sale. The affidavit in support of the originating summons merely says that the appellants had created a charge to secure a loan of RM150,000 at the rate of 12%pa and that there had been default by the appellants. *What is therefore striking is that nowhere in that affidavit is there any mention of the fact that the respondent is a licensed moneylender. The respondent actively concealed that fact*.
>
> Now, *if the respondent had indeed made the requisite disclosure, it would have immediately triggered the provisions of O 79 of the Rules of the High Court 1980 ('the RHC')*. It would have obliged the respondent to provide specific information on a number of matters, including the date of the contract of loan and particulars of the amount repaid and the amount due but unpaid. In other words, it was obligatory upon the respondent not only to produce and exhibit a copy of the note or memorandum prescribed by s 16 of the Act but also to exhibit a copy of the appellants' account as required by s 21 of the Act. *Of course, none of these matters were disclosed to the court by the simple method of concealing the truth, namely that the respondent was a licensed moneylender*.
>
> There are three other points that I think may be conveniently made now. The first is that O 79 r 5 of the RHC calls for mandatory compliance of the requirements of rr 2 and 3 where a moneylender's action is begun by originating summons. Since the respondent did not comply with the requirements of O 79 of the RHC, it follows that its originating summons was fatally flawed (Emphasis added.)

[20] It is quite clear that in the *Scotch Leasing*'s case the originating summons did not even disclose that the plaintiff in that case was a moneylender and the loan in question was given in a moneylending transaction.

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[21] In the case before us, the plaintiff has clearly disclosed that the transactions were moneylending transactions and the statement of accounts as required under O 79 has been clearly provided in the statement of claim as well as in the schedule to the statement of claim.

[22] The issue of how much was actually paid and how much was still unpaid is, to our minds, not an issue of compliance with O 79 r 3.

[23] The learned High Court judge's finding that the statement of claim is 'totally flawed and on this ground alone the plaintiff's claim must be dismissed' is therefore clearly erroneous.

BREACHES OF THE MONEYLENDERS ACT 1951 (ACT 400)

Section 27

[24] With regard to s 27 of the Act 400, the learned High Court judge had correctly found that the attestation requirement only applies to the third transaction, and that since the required attestation is not present on the promissory note, the third transaction is, by virtue of sub-s 27(3), unenforceable.

Section 16

[25] In evaluating compliance with the requirement for delivering an authenticated copy of the promissory notes for the first two moneylending transactions under s 16 of the Act 400, the learned High Court judge, in following the case *Aseam Credit Sdn Bhd v Eminent Avenue Sdn Bhd* [2003] 1 MLJ 90, appears to have come to the conclusion, as can be seen from para 12 of Her Ladyship's grounds of judgment, that the note and the authentication must be separately delivered.

[26] Abdul Malik Ishak J (as His Lordship then was) in *Aseam Credit*'s case referred to the judgment of Good J in the case of *Kartar Singh v Mahinder Singh* [1959] 1 MLJ 248. The relevant portion of Good J's judgment on delivery of an authenticated promissory note to the borrower quoted in *Aseam Credit*'s case is as follows:

> ... Section 16 of the Moneylenders Ordinance requires the delivery to the borrower of a copy of the memorandum authenticated by the lender or his agent. Authentication requires not merely that a signed copy of the memorandum should be delivered to the borrower but that the lender should endorse *upon it* something in the nature of a certificate confirming that what the borrower receives is a copy of the original memorandum.
>
> The onus is upon the plaintiff to prove that the requirements of the Ordinance have

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> been complied with, and that there is no evidence of authentication by the respondent in this appeal of the copy of the memorandum delivered to the appellant. ... It is *not necessary* that a copy of the form of authentication on the copy of the memorandum should be placed *on the memorandum itself*, but there must be evidence that the separate and additional *act of authentication* was done by the lender in relation to the copy of the memorandum. (Emphasis added.)

[27] We are unable to find anything in Good J's judgment, particularly the portion quoted above, which requires the certificate of authentication to be *separately delivered*. In fact, that judgment suggests that by placing the certificate of authentication *on the memorandum* (or promissory note) itself the requirement of s 16 would be complied with. It is only when it is *not* so placed that there must be evidence of the delivery of a *copy of the original memorandum*, NOT the separate delivery of the *certificate of authentication*.

[28] The promissory notes in the case before us are captioned 'MEMORANDUM UNDER SECTION 16' and are in two parts. The first part is the promissory note itself. The second part is the acknowledgement of receipt of the money and acknowledgement of receipt of a copy of the document (promissory note) before the loan amount was received and that the document so received was at that point of receipt authenticated by the lender/plaintiff *but not yet signed by the borrower/defendant*.

[29] We find that the learned High Court judge did not give due consideration to the words set out in the second portion of the memorandam/promissory notes.

Section 18

[30] The learned High Court judge had found that there was non-compliance with s 18, which is the requirement that the accounts of each loan by a moneylender be kept in permanent books, and that the plaintiff had failed to produce the accounts book.

[31] We note that while the defendant had raised the issue of non-compliance of various provisions of Act 400 in his defence, non-compliance with s 18 is not one of them.

[32] We are unable to find anything in the evidence of the witnesses called by both parties (PW1 and DW1) that touches on the non-compliance of s 18 itself.

[33] There appears to be confusion between the issue of the ability/inability of the plaintiff to substantiate its claim for amounts outstanding under the

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moneylending agreements by not producing certain accounts, as opposed to the non-compliance of s 18 itself. One is purely a matter of evidence while the other is a matter of statutory compliance.

Section 23

[34] Section 23 of the Act 400 in force at the material time provides as follows:

> 23 Any agreement between a moneylender and a borrower or intending borrower for the payment by the borrower or intending borrower to the moneylender of any sum on account of costs, charges or expenses other than stamp duties, fees payable by law and legal costs incidental to or relating to the negotiations for or the granting of the loan or proposed loan shall be illegal, and if any sum is paid to a moneylender by a borrower or intending borrower as, for or on account of any such costs, charges or expenses other than as aforesaid that sum shall be recoverable as a debt due to the borrower or intending borrower, or in the event of the loan being completed, shall, if not so recovered, be set off against the amount actually lent and that amount shall be deemed to be reduced accordingly.

[35] First of all we note that in his defence the issue of charges having been imposed in contravention of s 23 was not raised by the defendant.

[36] In fact, in para 6 of the defence the reduced amounts received under the first two loans were set out in the context of the defendant's claims that the plaintiff had imposed excessive interest.

[37] In his evidence, the defendant ('DW1') contended that for the first two transactions, he received less than the amount stated in the promissory notes. He claimed that the difference was being treated by the plaintiff as an upfront repayment of the interest. This was disputed by the plaintiff, who claimed that that difference was paid to a third party, Acuron Enterprise Sdn Bhd, at the behest of the defendant as advance payments for consultancy services provided by this third party to the defendant. The defendant denied having such arrangement or even knowing of such services.

[38] From the notes of evidence it appears that three documents to show the existence of agreements for consultancy services entered into between the defendant and Acuron Enterprise Sdn Bhd were tendered during the cross-examination of PW1. It was the defendant's counsel who sought the production of these documents. They were marked as D11 A to C.

[39] Unfortunately these documents (D11 A–C) were not included in the record of appeal. It appears to us that these documents were not considered relevant by the learned High Court judge who dismissed the plaintiff's claim of

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the existence of such agreements and the request by the defendant for part of the loan amounts to be paid towards the consultancy agreements. Her Ladyship found that the request and the consultancy agreements were not pleaded.

[40] In our view the learned High Court judge did not give sufficient consideration for the reasons given by PW1 for his admission that a sum which was less than the actual loan amount was paid to the defendant himself. We find that the difference between additional charges (which are prohibited by s 23) in respect of the loans, and the payment of part of the loan amount to a third party was not considered.

Section 17A

[41] It must be pointed out that s 17A only came into being on 1 November 2003. There was no s 17A at the time the first two loans were given out. The complaint about the excessive interest is found in paras 6 and 7 of the defence and the averment is that such excessive interest violates s 17A.

[42] Before 1 November 2003, the provisions on the maximum rates of interest which can be imposed in moneylending transactions were contained in s 22. That section has now been repealed.

[43] Unlike s 17A which provides in sub-s 17A(3) that a moneylending agreement which imposes a rate of interest higher than that prescribed in sub-s 17A(1) shall be void and unenforceable, s 22 merely presumes that a moneylending transaction which imposes an interest rate higher than the prescribed rate is harsh and unconscionable and it enables the court to reopen the transaction under s 21. The moneylender would then still be able to recover such sums as adjudged by the court to be reasonable.

[44] The learned High Court judge had unfortunately not considered the difference between s 22 (now repealed) and s 17A in the treatment of interest rates in excess of the prescribed rates. Such consideration is critical in view of the fact that it was s 22 which governed the first two transactions, not s 17A. The complete dismissal of the plaintiff's claim is the result of s 22 not having been given any consideration at all.

DECISION

[45] In view of our findings above, we allowed the plaintiff's appeal, and order that this case be remitted back to the High Court and be retried before another judge. We further order that costs shall be in the cause and that the deposit be refunded.

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A *Appeal allowed and case ordered to be remitted back to the High Court.*

Reported by Ashok Kumar

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